In the Supreme Court of the United States

OCTOBER TERM, 1944.

No.....

MILTON M. KRAMER,
WALLACE FLOYD NELSON,
JOHN ELLIOTT MAGRAW,
LOREN ELMER TESDELL,
JOSEPH GUINN,
JAMES WERNER BRISTAH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION.

JURISDICTION.

A statement as to the jurisdiction is contained in the foregoing petition and the same is adopted and made a part of this brief.

STATEMENT OF THE CASE.

A statement of the case is contained in the foregoing petition and the same is adopted and made a part of this brief.

POINT 1.

Federal Regulation 653.12 conflicts with the Act of Congress 5(g) and is null and void so far as this case is concerned.

Petitioners were indicted, tried, convicted and sentenced to five years in the penitentiary for "going out of

a civilian public service camp without permission" in alleged violation of Federal Regulation 653.12, 8 Federal Register 429, allegedly issued under authority of the Act of Congress Selective Service and Training Act of 1940, Section 5(g). Both of these Acts are quoted in the petition and are made a part of this brief.

In substance, Congressional Act 5(g) provides that conscientious objectors opposed to participation in military service in any form so found by their draft boards shall, in lieu of induction into the armed services, be assigned to work of national importance under civilian direction.

Federal Regulation 653.12 was issued by General Hershey, the director of Selective Service appointed by the President, and so far as this case is concerned provides that conscientious objector assignees "shall remain in camp to which they are assigned."

Congress gave conscientious objectors a privileged exemption but provided that they should be assigned to work of national importance. The Director of Selective Service, by Regulation 653.12, ordered that petitioners who had been found to be conscientious objectors by their draft boards, be assigned to camp. Petitioners did not object to this in so far as it placed them in contact with the work to be done, but, in assigning them to work of national importance, Congress did not provide that they should be confined in camp or condemned to remain in camp subject to the will of the Director of Selective Service, or that they be punished by being confined in camp night and day.

The Director of Selective Service, General Hershey, seems to have misapprehended his duties and authority in the treatment of conscientious objectors. His subordinate, Col. Franklin McLean, another army man of the Camp Operation Division of the Selective Service Headquarters, in a memorandum, defined the extent of the authority of those in control of civilian public service camps as follows:

"From the time an assignee reports to camp until he is finally released he is under control of the Director of Selective Service. *He ceases to be a free agent and is accountable for all of his time, in camp or out, 24 hours a day.* His movements, actions and conduct are subject to control and regulation. *He ceases to have certain rights and is granted privileges instead. These privileges can be restricted or withdrawn without his approval or consent as punishment*, during emergencies or as *a matter of policy.* He can be told when and how to work, what to wear and where to sleep. He can be required to submit to medical examinations and treatment and to practice rules of health and sanitation. He may be moved from place to place and from job to job, even to foreign countries, for the convenience of the government regardless of his personal feelings or desires." (Emphasis ours.)

I submit that this shows complete misapprehension of the selective service officers of their rights and duties in the treatment of conscientious objectors.

The only authority given them by Congress was to assign them to work of national importance. The officers conceived it to be their duty to take complete charge of the life and activity of conscientious objectors, to confine them in camp, to regulate their acts and mode of living twenty-four hours a day. This amounted to complete military control or to imprisonment. So far as preventing petitioners from going out of camp was concerned, the act for which they were indicted, this regulation is null and void. Petitioners were under no obligation to observe it.

POINT 2.

Federal Regulation 653.12 was issued under an unconstitutional delegation of legislative authority so far as this case is concerned and is null and void.

Section 1, Article I of the Constitution of the United States provides that legislative powers are vested in Congress. It is a well settled principle of law that when Con-

gress announces a policy and authority is given an administrative body to do certain things thereunder, the latter's rights are confined to administering the policy as announced by Congress and if another policy is announced or followed by the administrator, the latter policy is void.

U. S. vs. Chicago, 283 U. S. 11, at page 328 the court says:

> "It long has been settled in this Court that the rejection of an unconstitutional condition imposed by a state upon the grant of a privilege, even though the state possess the unqualified power to withhold the grant altogether, does not annul the grant. The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant."

See other cases contained in this decision. This principle seems undisputed.

Section 5(g) of the Selective Training and Service Act provides that conscientious objectors be assigned to work of national importance. Anything that has to do with the assignment to work is authorized but anything that relates to the regulation of the life or acts of conscientious objectors is beyond the purpose or authority of the act. The Director of Selective Training and Service, a military general, and his subordinates, mostly army men, conceived it to be their duty and policy to make the lot of conscientious objectors in camp so hard that it would frighten actual conscientious objectors from claiming to be such. This was a different policy from that authorized by Congress and is null and void.

In the case of *Weightman vs. U. S. A.*, Case No. 3913, tried in the U. S. Circuit Court April 3, 1944, First Circuit Judge Woodbury, in his opinion, says:

> "To weed out the insincere and thus avoid an obvious abuse, the way of the honest conscientious objector has been made hard."

This decision was followed in the instant case and the statement of Judge Woodbury was approved. I submit that there is no authority under the Act of Congress to make the way of the conscientious objector hard. This would defeat the purpose of Congress and announces a new and different policy in conflict with the Congressional Act and is null and void.

POINT 3.

Petitioners received no pay for their work although under the Act of Congress they could be paid, and were deprived of the benefits of workman's compensation and allowances for themselves and their dependents.

It is unthinkable, but the fact nevertheless, that conscientious objectors who were, by the Act of Congress, exempted from military service and assigned to work of national importance, were paid nothing for their work of some fifteen months and were refused the privilege of a couple of days off to attend a meeting of members of their profession. Congress, in providing that these men were to be assigned to work, impliedly provided that they should be paid. Every man has a constitutional right to work and to be paid for his services. Congress did not provide that these men who were not criminals should be confined, imprisoned or punished, but they were enslaved. Congress expressly provided that they might be paid. This was denied them The government has received hundreds of thousands of dollars in wages from employers to whom conscientious objectors have been farmed out and has kept the money. Conscientious objectors have received nothing for their work and at the same time were obliged to pay the government $35.00 each month, for their food and clothing. I do not know who conceived the idea of treating conscientious objectors in this illegal manner. Certainly Congress did not have any such idea. I submit that petitioners did not have to submit to any such treatment.

General Hershey testified before the Senate committee February 17, 1943:

> Senator Walgreen: Does he (C. O.) get any money for his work?
>
> General Hershey: No, sir, he gets nothing.
>
> Senator Walgreen: You are treating these fellows worse than the Japs.
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> * * * * *
>
> Senator Gurney: Do you have a man in the federal government who is at the head of this program?
>
> General Hershey: Well, the Director of Selective Service has been made the director of the program at the moment.
>
> Senator Gurney: You are not a civilian as I see it.
>
> * * * * *
>
> General Hershey: The conscientious objector, by my theory, is best handled if no one hears of him. Conscientious objectors receive no pay for their work.
>
> Senator Walgreen: Do you feel that they should be paid?
>
> General Hershey: Definitely not.

Chief of Camp Operations, Col. Louis S. Kosh, testified before the Senate committee August 19, 1942, as follows:

> "We feel that as soon as we set up a pay schedule for these people, that is in any way comparable to that of the army, then the slacker will say 'Well, this is a good place for me to get in,' and we feel that by not making payment is one of the ways we have of sorting out the slacker from the conscientious objector."

We submit that petitioners were not obliged to remain in camp where they were deprived of their constitutional right to receive pay for their sustenance and that of their families.

POINT 4.

Petitioners were required to pay the government $35.00 a month for their board and clothing and received no pay.

This requirement amounted to a fine. The camp authorities had no legal right to require these men to pay $35.00 a month to the government while receiving no remuneration for their work. These men were not criminals. They had not been charged with any crime when they were assigned to camp. They had a legal right to claim exemption as conscientious objectors and their being charged $35.00 a month while their families were left in want amounted to a fine. It was a cruel punishment. These men had a perfect right to protest against this confinement in camp for the above reasons.

POINT 5.

If assigned to work for private employers, petitioners' wages were taken by the government.

The government has received hundreds of thousands of dollars in cash for the earnings of conscientious objectors farmed out to private employers. These men have done no wrong. The rule under which they received no pay was void. Congress had made provision allowing them to be paid. Public Law 630 passed June 27, 1942 so makes this possible. General Hershey, I believe, admits that it is possible for them to be paid. But petitioners were not paid and were confined to camp. They had a right to protest and they did. Free American citizens who had done no wrong were not obliged to submit to such treatment and the regulation under which they were confined in camp was void.

POINT 6.

The act of "going out of camp without authority" charged in the indictment was trivial under the circumstances.

The act of "going out of camp without permission" as charged in the indictment was trivial. Congress provided that conscientious objectors should be assigned to work of national importance. The Act of Congress did not provide that conscientious objectors could be imprisoned or fined or punished for being conscientious objectors. The regulation under which they were ordered to remain in camp was without authority. The only limitation placed on the right of conscientious objectors by the Act of Congress beyond that placed on any American workman was that conscientious objectors should be assigned to work of national importance and confining them in camp was a void act. Any rule or regulation requiring a workman to remain in a camp night and day would be void. It made possible the indictment, trial and sentence to five years imprisonment of a conscientious objector who stepped over the deadline of a camp.

There is nothing in the Act of Congress that authorizes any such regulation of a citizen in the performance of his work. Under this rule, if a conscientious objector did not take a bath, appeared before the officers of the camp in soiled or ragged clothes, did not make up his bed to the satisfaction of the inspectors, failed to sweep the floor or wash the windows of his quarters, manicure his nails or get an approved style of haircut, he could be sent to prison for five years.

I submit to this Honorable Court that there is nothing in the Act of Congress which authorizes conscientious objectors to be prohibited from stepping out of camp. These men did not refuse to work. They had worked as directed for fifteen months, but the rule under which they were imprisoned was null and void and its violation did not constitute an offense in law.

POINT 7.

Regulation 653.12 and the treatment of petitioners in C. P. S. Camp violated the constitutional guarantees against involuntary servitude, cruel and unjust punishment, unlawful delegation of legislative authority, freedom of conscience and worship, and taking property without due process of law.

Petitioners were confined in a camp in violation of Amendment XIII, Section 1 of the Constitution prohibiting involuntary servitude. They were subjected to cruel and unjust punishment in violation of Amendment VIII. Regulation 653.12 was issued under an illegal delegation of authority contrary to Article I, Section 1 of the Constitution. Petitioners were deprived of free exercise of religion and worship by their confinement and treatment in camp contrary to Amendment I of the Constitution. The right to receive remuneration for their work was taken from them contrary to Amendment V of the Constitution entitling them to due process of law. The regulations under which petitioners were indicted, tried and sentenced were unconstitutional, null and void, and petitioners were under no obligation to obey the provision under which they were indicted, to-wit, "going out of camp without permission."

POINT 8.

The lower courts asserted that if Section 653.12 was not authorized by Section 5(g) of the Selective Training and Service Act, then it was issued under the war powers of the President. We will show that petitioners were not tried under any war power.

In the case of *Weightman vs. U. S. A.*, Case No. 3913 of the First Circuit, tried April 3, 1944, which case was cited with approval in the case at bar, Judge Woodbury said:

> "Furthermore, I think that the President, aside from his ordinary peacetime powers, has power to take action with respect to conscientious objectors for the reason that the Constitution (Article II, Section 2, Clause 1) invests him as Commander in Chief of the Army and Navy of the United States, with power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the armed forces."

We do not question the war power of the President, but we do question the authority of the President to act contrary to an Act of Congress. Congress, by Section 5(g) of the Selective Training Act, provides that conscientious objectors should be assigned to work. The President, through General Hershey, by Regulation 653.12, confined petitioners, conscientious objectors, in a camp without pay. If this regulation is an order issued under the President's war powers, petitioners should have been tried under the Articles of War, not in a civil court.

Judge Martin, in his opinion in the case at bar, says, and he adopts the opinion of Judge Woodbury, that the trial of petitioners in a civil court shows that the camp to which petitioners were assigned was under civilian control, not military. But if 653.12 is a war power regulation as claimed, petitioners could not be tried in the civil court and this would show that the camp was under military control, not civilian. If this is the case, the trial of petitioners was of no effect and is void.

POINT 9.

The C. P. S. Camp in which petitioners were confined was, in essence, under military control and contrary to the Act of Congress 5(g) above referred to.

In the recent and widely read book, "Mr. Smith Meet Mr. Cohen," by James Waterman Wise and Lee J. Levinger, the authors say with reference to World War I:

> "American Jews, inveterate individuals as always, likewise produced some of the conscientious objectors whose mistreatment is a blot on the otherwise splendid record of war time America."

Since that time, England passed a liberal act for the treatment of conscientious objectors. Our Congress likewise passed a conscientious objector act generous in its terms.

The provision of 5(g) of the Selective Training Act provided that all conscientious objectors opposed to war were to be assigned to work of national importance under civilian control. This act was unambiguous and clear in its meaning. Conscientious objectors were not to be under military control. What happened? Instead of conscientious objectors being exempted from military control, Regulation 653.12 was issued; C. P. S. Camps were established. Conscientious objectors were confined there, deprived of their earnings, removed from their homes and families, and required to remain confined in camp. They were removed as far as possible from civilization and the work they were required to do was of no immediate benefit to the war effort and the work required of them was the kind for which they had no training or aptitude, performed in a camp headed by an army general whose subordinates were army men, all appearing in army uniform and all paid by the army. It is true that the actual work in the field was under the direction of a civilian who was not much more than a local boss and apparently appointed to

make possible the claim that the work was under civilian direction, whereas the management and control of the camp as set up was military.

The rules governing the camp were practically the same as those governing army camps. General Hershey testified before the Senate committee Feb. 17, 1943:

> "We have tried to parallel the army in the privileges, withholding of privileges * * *. We ship them (C.Os.) away from their homes. We do not let them stay in their home territories * * *. We bring these people east from the west coast and take them to the west coast from the east coast * * *. The conscientious objector, by my theory, is best handled if no one hears of him."

Congress clearly provided that conscientious objectors were to be exempted from military service and assigned to work of national importance under civilian direction. The management of conscientious objectors has been turned over to General Hershey, an army man. Two of his chief subordinates, Louis F. Kosh, Chief of Camp Operations, and Col. Franklin McLean, in charge of official inspection, and others at the camp, were army men. They paralleled the army rules in the management and treatment of conscientious objectors. Instead of assigning conscientious objectors to work of national importance under civilian direction, the management was turned over to an army man who has set up war provisions to govern the camp and it is, in reality, under military control.

The purpose of this control, as expressed by General Hershey and his subordinates, is to make the lot of conscientious objectors so hard that few will claim their privilege as conscientious objectors. The C. P. S. Camps are military in essence and not civilian. The Act of Congress has been nullified by the rules of the army men to whom the execution of the Act has been turned over.

We submit that the treatment of conscientious objectors in being confined to camp is contrary to the Act of Congress and that the indictment, conviction and sentence of petitioners for "leaving camp without permission" is unauthorized, unconstitutional and void, and we respectfully ask this Court to grant this petition.

Respectfully submitted,

JOHN A. CHAMBERLAIN,

Attorney for Petitioners.

Cleveland, Ohio,
March 7, 1945.